

IN THE COURT OF APPEALS 09/03/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00309 COA

ELBERT HARRIS A/K/A "MOOKY"

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JOHN L. HATCHER

COURT FROM WHICH APPEALED: COAHOMA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

TOM T. ROSS, JR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: LAURENCE Y. MELLEN

NATURE OF THE CASE: CRIMINAL - ARMED ROBBERY

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED AS AN HABITUAL
OFFENDER TO SERVE A TERM OF LIFE IMPRISONMENT.

BEFORE BRIDGES, P.J., BARBER, AND McMILLIN, JJ.

BARBER, J., FOR THE COURT:

Elbert Harris was convicted of armed robbery pursuant to section 97-3-79 of the Mississippi Code. He was sentenced as an habitual offender to serve a term of life imprisonment. Feeling aggrieved of the judgment against him, Harris appeals, raising the following issues:

I. THE TRIAL COURT ERRED IN NOT ALLOWING STEVE YOUNG TO TESTIFY AS TO THE IDENTITY OF THE PERSON HE THOUGHT WAS THE ROBBER.

II. THE VERDICT OF THE JURY WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AND WAS NOT SUPPORTED BY ANY SUBSTANTIAL EVIDENCE.

Finding these assertions of error to be without merit, we affirm the decision of the trial court. FACTS

On August 23, 1992, the Piggly Wiggly Store on State Street in Clarksdale, Mississippi was robbed. Detective Danny Hill with the Clarksdale Police Department investigated the incident. He interviewed several witnesses to the robbery. Three store employees were able to positively identify the perpetrator from a photographic identification line-up. One of the witnesses was the store manager, who was threatened at gunpoint by the robber. All three witnesses identified Elbert Harris as being the person who committed the robbery.

ANALYSIS

I. THE TRIAL COURT ERRED IN NOT ALLOWING STEVE YOUNG TO TESTIFY AS TO THE IDENTITY OF THE PERSON HE THOUGHT WAS THE ROBBER.

During his case in chief, the Defendant called his cousin, Steve Young, as a witness. Young testified that he was in the store at the time of the robbery and heard a woman screaming. After recovering from an episode of momentary panic, he ran to see what was happening and saw a man with his arms folded going out of the door. Young stated that others had said that man was the robber, but Young could not see whether the man had a gun due to the large number of people in the store at the time of the robbery. Counsel for the defense then asked Young if "At that time, in your mind, did you think that person was the robber?" The State's objection to this question was sustained. Defense counsel then asked Young "Who do you think that person was?" The State again objected, and the objection was once again sustained. The court directed the defense to ask only questions of what the witness saw or heard, not what the witness thought. A proffer of Young's testimony was made in which Young stated that he knew Harris and Harris was not present at the Piggly Wiggly during the time of the robbery and that he thought the man who exited the store with his arms folded was the robber.

Harris argues that Young's testimony was a present sense impression and should have been admitted as relevant evidence in this case. The court stated that the State's objection to this testimony was sustained because "the testimony was as to his thoughts rather than what he saw or heard."

During cross-examination, Young testified that while he was present at the Piggly Wiggly during the course of the robbery, he did not actually witness the robbery taking place. He did not see anyone grab any money; he did not see anyone hit the store manager in the head. He also did not see anyone with a pistol, and he did not see anyone run from the store.

The State argues, and we agree, that under these circumstances, allowing Young to testify as to who he "thought" the robber was, would be purely speculation and conjecture on his part. Therefore, his testimony would not be relevant as to the identity of the robber. Consequently, we find this assertion of error without merit.

**II. THE VERDICT OF THE JURY WAS AGAINST THE OVERWHELMING
WEIGHT OF THE EVIDENCE AND WAS NOT SUPPORTED BY ANY
SUBSTANTIAL EVIDENCE.**

When we review the denial of a motion for directed verdict, we give the State the benefit of all favorable inferences and then examine the evidence to be sure it supports the verdict beyond a reasonable doubt. *Pierre v. State*, 607 So. 2d 43, 54 (Miss. 1992). We will not reverse unless we conclude that no reasonable, hypothetical juror could have found the defendant guilty. *Ross v. State*, 601 So. 2d 872, 874 (Miss. 1992). In reviewing the evidence in this case, we find it is sufficient to support a verdict of guilty beyond a reasonable doubt. Therefore, we find no error in the denial of the motion for a directed verdict.

When deciding whether the verdict is against the overwhelming weight of the evidence, we must accept as true all the evidence supporting the State's position, as well as all reasonable inferences flowing therefrom in the light most favorable to the State. *Britt v. State*, 520 So. 2d 1377, 1379 (Miss. 1988). Considering this standard, and after reviewing the record, we find that the jury had an abundance of evidence to support a guilty verdict. Therefore, based upon the weight of the evidence supporting the verdict, we find that the trial court did not abuse its discretion in denying the Defendant's motion for a new trial. Accordingly, we affirm Harris's conviction.

THE JUDGMENT OF THE COAHOMA COUNTY CIRCUIT COURT OF CONVICTION OF ARMED ROBBERY AND SENTENCE OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AS AN HABITUAL OFFENDER IS AFFIRMED. SENTENCE SHALL RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED. COSTS ARE ASSESSED AGAINST COAHOMA COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.